TESTIMONY OF JEFFREY A. CLEVENGER
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BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
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I. INTRODUCTION

My name is Jeffrey A. Clevenger. I am President & C.E.O. of SMS Group Incorporated located in Saginaw, Michigan. SMS Group employs roughly 100 workers. The bulk of our product line is devoted to vertical and inverted spindle lathes at an annual sales volume of about $20 million. I am Chairman of the Government Relations Committee of AMT, the trade association that John Logan chairs.

Today, I would like to focus my remarks on two areas in which Congress can facilitate enhanced competitiveness in the global marketplace for American manufacturers. One is to address the liability exposure resulting from the abundance of overage durable equipment used in workplaces today. The other is a continued commitment to government-sponsored R&D funding such as that provided by the Commerce Department's Advanced Technology Program (ATP).

II. THE NEED FOR A FEDERAL STATUTE-OF-REPOSE FOR WORKPLACE DURABLE GOODS

According to American Machinist magazine, in 1996 (the last year for which data is available), over 60% of machine tools used in U.S. metalworking industries were over 10 years old. When a factory decides to invest in new capital equipment, the old machinery is not thrown in the trash heap. Instead, companies, who lack the resources for new machines, purchase these overage machines, often

altering them to fit their needs. This process is repeated, as newer machines are acquired and older ones resold. As a result of base closures over the past few years, the Defense Department has resold over 15,000 overage machine tools since 1994. They are now being used in job shops across America. Most of the machines are of World War II or Korean War vintage. The result of all of these factors is a big overhang of overage machine tools in the U.S. market. This exposes the manufacturers of the old equipment to costly litigation. In addition, it exposes companies that, like SMS, sprung out of corporate divestiture and later discovered they had assumed the historical liability for the equipment built by the dissolved company. Machines they never even manufactured.

Under product liability law today, in many states, potential liability for my industry's products is endless – literally "forever." Many of these machines – built before the creation of OSHA, before Neil Armstrong walked on the moon, before the Beatles came to America – are still in use today. Although these machines were built decades ago to safety standards of their day and although they are likely to have passed through several owners – each of whom are likely to have made their own modifications to accommodate their needs – they are still the subject of almost half of our industry's lawsuits.

SMS Group has been in business for about 20 years. Of all the product liability suits we have defended during that time, not one involved a machine made by SMS. All 23 cases involved equipment manufactured by the company whose assets were purchased to form SMS more than two decades ago. SMS does not even manufacture the same types of machines named in the suits. We provide no service for them, no specs, and no spare parts. Yet defending them in court has cost us in excess of $6.5 million. In every case, the machine in question had passed through at least two owners (and in some cases, four or five). And in every case, the machine had been modified (sometimes contrary to government safety standards). Very often, every safety door and guard had been removed prior to the

injury. All 23 machines involved were over 18 years old.

Of that $6.5 million spent to defend these cases, only $2.5 million went to claimants, and of that, at least one-third went to plaintiffs' lawyers and some went as subrogation to claimant's employers or their insurance companies, even in instances where there was substantial employer fault. Some of these cases are eventually dismissed. Still others are withdrawn by plaintiffs who did not count on companies like us fighting back. Yet, we still spent $4 million defending ourselves in litigation over machines that we didn't make, and in most cases, has lost complete track of. These figures exclude the many extra man-hours put in by me and my employees working on these cases. Just tracking a serial number for one of these machines is a lesson in diligence and patience because most, if not all, of the companies originally associated with this equipment have since gone out of business.

SMS is lucky. We are able to carry product liability insurance coverage – $1 million worth of it at an annual premium of $100,000. When it came time to renew our policy this year, we wrote to several insurance companies with letters looking for additional coverage. We did not receive one quote. I believe the reason our carrier continues our present coverage is because of the aggressive manner in which we tackle these cases. However, should a case ever reach trial and the jury find for the claimant, a large judgment would force us to close our doors. The $7.5 million verdict in 1996 involving a machine built in 1948 against Mattison Technologies, a 100-year old Rockford, Illinois machine tool builder, led to the company's bankruptcy.

In contrast to the significant long-tail exposure of U.S. builders, the incursion by foreign machine tool builders into the U.S. market is fairly recent (within the past 20 years). American companies that have been in business for many years must factor into their prices the risk of litigation involving thousands of overage machines. Our Japanese and European competitors don't have those risks and

those costs. Their liability exposure is relatively small (both Europe and Japan have 10-year statutes-of-repose). Enactment of a federal statute-of-repose for workplace durable goods would therefore level the playing field for U.S. manufacturers and achieve the uniformity and certainty necessary to produce the state-of-the-art products for which we are noted.

III. H.R. 2005

Over the years, we have testified before this and other Congressional committees in support of numerous product liability bills. Because those bills were broad in scope, some of their provisions drew controversy that could not be overcome during their consideration by the Senate and/or the White House. H.R. 2005, recently approved by the House Judiciary Committee, deals only with the issue of overage workplace products. It provides for a federal 18-year statute-of-repose for equipment used in the workplace. It does not contain controversial provisions on other product liability issues that have held up passage in past years. The bill is identical to the statute-of-repose provisions contained in product liability legislation agreed upon for consideration in the last Congress, after extensive negotiations between the White House and a bipartisan group of Congressional leaders.

Under this proposal, no injured worker would go uncompensated. H.R. 2005 would only deal with claims involving injuries allegedly caused by workplace durable goods for which the plaintiff has received or is eligible to receive worker compensation. For that specific category of cases, the provision would create a uniform, national statute-of-repose, preempting any state statutes-of-repose that apply to those claims. Otherwise, state law would continue to apply. Thus, state statutes-of-repose that may cover consumer goods and other non-durable goods would not be affected.

The period within which claimants could bring a lawsuit would be extended to 18 years in the

12 states that have enacted time limits (all of them shorter than 18 years); but our members are willing to accept that extension in order to achieve the certainty a national period of repose would provide.

An additional eight states have enacted statutes-of-repose based on the "useful safe life" of the product. This approach has proven to be ineffective; because the "useful safe life" of each product must be litigated in every case, and substantial transaction costs must still be incurred.

Enactment of a federal 18-year statute-of-repose for workplace products would improve the competitiveness of U.S. workplace equipment manufacturers by driving down their litigation costs and cutting down on meritless lawsuits. Passage of similar legislation relating to private aircraft has revitalized the domestic aircraft industry.

SMS Group sees no end to our potential liability for the machines that are the subject of all of our company's lawsuits – machines that SMS did not even build. As long as the equipment is still on factory floors, we can be sued. Any one of those lawsuits could put us out of business. Please adopt an 18-year statute-of-repose for capital goods used in the workplace.

IV. THE ADVANCED TECHNOLOGY PROGRAM

I would like to take a moment to touch on another issue that affects the competitiveness of the machine tool industry and that is government-funded research and development. House and Senate conferees have provided $211 million (5% more than last year) for the Commerce Department's Advanced Technology Program (ATP) The ATP facilitates cooperative research by private industry and academia to accelerate the development of high-risk technologies that promise significant commercial payoffs and widespread benefits for the economy. ATP projects are private industry driven. Universities and non-profit independent research organizations play an important role in ATP projects. More than 100 different universities (including the University of Michigan) are involved in

more than 180 ATP projects. SMS has been a very successful recipient of ATP awards. Four out of five SMS proposals have received ATP grants.

Using one as an example, in 1991, SMS, working with the Engineering School of the University of Michigan, collaborated to obtain a $1.7 million grant "Advanced Compensation Techniques for Enhancing Machine Tool Accuracy." Because of this ATP grant, we were able to combine the development by the University of Michigan of computer mathematical modeling with SMS' real-time measuring of heat build-up in various parts of cutting-type machine tool.

The problem this R&D project solved is that, as machinery is used on the factory floor, it "heats up;" thus changing the parts it is producing. As a result of what we learned from this project, the parts produced at the end of a day (when the machine is "hot") are exactly the same as the parts produced when the machine starts up in the morning.

We placed seven sensors in the machine. These sensors feed the temperature data into a computer processor, then developed software and modeling tells the computer to automatically make adjustments to compensate for temperature changes. Temperature changes that occur during the day cause the machine to lose accuracy due to "thermal growth." The new system improves accuracy (often in the tenths of a thousandth of an inch) without manual intervention, yielding higher quality and productivity with less operator intervention.

Our "commercialization effort" now has many machines in the field successfully working with an expected forecast of up to 50 percent of all new machines of this type built with the "Accu-System" feature. In 1998, we partnered with the University of Michigan again to take this technology to a

broader application of machine tools through a National Science Foundation (NSF) grant entitled "Robust Error Compensation Methods for Machine Tools."

In summary, very few companies have the capability and resources to advance the "state-of-the-art" without substantial risk. As a result, further advancements in manufacturing will have to be done collaboratively and with reduced risk. By forging a unique partnership between government, industry, and academia, the ATP enhances and encourages both. I urge you to continue supporting this program.

V. CONCLUSION

Mr. Chairman, I want to thank you and the Committee for inviting me to appear with two of my colleagues to speak on behalf of our industry about some of the issues that affect us as we prepare to do business in the new millennium. I touched on two areas where Congress can help.

By enacting an 18-year statute-of-repose, such as H.R. 2005, Congress would be declaring that endless litigation involving overage workplace equipment in the U.S. marketplace is a serious problem facing American producers who are, after all, the foundation of our industrial economy; and that the interstate commerce clause impels a federal solution. It is a problem not faced by our Asian and European competitors in their own markets nor, because of the longtail of exposure, in ours. The current system has cost jobs, money, and time. The principal beneficiaries have been lawyers on both sides of the counsel table. Advances in high-tech products are slowed as a result. Resources that could have gone toward the development of new technology and higher productivity for America have been expended on wasteful transaction costs with a relatively small percentage of total litigation dollars going to injured workers.

H.R. 2005 does not contain controversial provisions on other product liability issues that have held up passage of reform in past years. In fact, the bill is identical to the statute-of-repose provisions contained in product liability legislation agreed upon for consideration in the last Congress, after extensive negotiations between the White House and a bipartisan group of Congressional leaders. I urge you to enact H.R. 2005 as quickly as possible.

And by continuing to fund government-sponsored R&D programs, such as Commerce's ATP, Congress would be supporting a working partnership between the government, American industry and universities that will develop the technologies that will lead to the state-of-the-art products for which we are known throughout the world – a partnership that would not come together without the program.

Lastly, I would strongly urge the Senate to take action before the end of the session to extend the R&D tax credit. The Senate Finance Committee has approved an 18-month, retroactive extension of the credit. The tax credit is an inexpensive way for the Congress to encourage the R&D efforts of American businesses. Please do not go home without extending it.

Thank you for your attention. I would be pleased to respond to your questions.